IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-2269
[2019] NZHC 835

UNDER	The Judicature Amendment Act 1972 Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review
BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE DEPARTMENT OF CORRECTIONS Respondent

……/continued

Hearing:	27 and 28 September 2018; further submissions 3 and 10 October 2018
Counsel:	N Levy and AL Hill for applicant in CIV-2017-485-804 A Todd, H Farquhar and N Fong for respondents in both proceedings
Appearance:	PJ Smith (via AVL) in CIV-2016-404-2269
Judgment:	16 April 2019

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 16 April 2019 at 11 am,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:	Cooper Legal, Wellington Crown Law, Wellington
To:	PJ Smith, Wellington

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-804

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions by the respondents about the applicant's temporary release for the purposes of employment
BETWEEN	HAYDEN JOSEPH TAYLOR Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Respondent
	SERCO NEW ZEALAND LIMITED Second Respondent

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Introduction

[1] Phillip John Smith is serving a life sentence for murder. He became eligible for parole in 2009. To date, he has not been granted parole. In 2013, the Parole Board recommended he be permitted to participate in temporary removals and releases from prison under s 62 of the Corrections Act 2004 (the Act). On 6 November 2014, Mr Smith was granted a temporary release from prison for 72 hours. That day, he boarded a flight to Chile and fled. He therefore did not return from his temporary release by the due date of 9 November 2014. Mr Smith was eventually apprehended in Brazil and deported back to New Zealand. His escape attracted significant media attention in New Zealand and the Department of Corrections came under public scrutiny and criticism.

[2] Mr Smith's escape caused the Department of Corrections to reconsider its policies about temporary releases. Through several guidelines issued in the wake of his escape, the availability of temporary release to prisoners more generally (i.e. not only to Mr Smith) was curtailed for an extended period.

[3] Mr Smith now applies to judicially review those guidelines.[1] The essence of his application is that the guidelines took a "blanket" approach to applications for temporary release and as a result, unlawfully excluded from consideration for such release certain classes of prisoners statutorily entitled to be so considered. Mr Smith also argues that some of the guidelines unlawfully restricted the purposes for which temporary release could be granted.

[4] Mr Smith says the guidelines were thereby ultra vires the relevant empowering provisions in the Act and/or amounted to an unlawful dictation which fettered the discretion of those making decisions on temporary release.

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1 The respondent to Mr Smith's application is the Attorney-General on behalf of the Department of Corrections. For ease of reference, I will refer to the respondent as "the Department". The Department initially sought to strike out Mr Smith's application, on the basis he lacked standing to bring it. In a judgment dated 18 July 2017, Palmer J accepted that Mr Smith has standing and accordingly dismissed the Department's application. See *Smith v Attorney-General* [2017] NZHC 1647.

[5] Hayden Joseph Taylor also applies to review certain temporary release decisions, insofar as they affected him personally. Mr Taylor is serving sentences of life imprisonment for murder and preventative detention for rape. He has participated in several programmes while in prison, including release to work (RTW) which is a type of temporary release. At the time of Mr Smith's escape, Mr Taylor was participating in RTW. In late 2014, however, he was withdrawn from RTW and later applications to return to RTW were declined.

[6] Originally, Mr Taylor's application gave rise to issues similar to Mr Smith's, in that Mr Taylor said he was unlawfully excluded from being considered for RTW in late 2014 as a result of the alleged blanket approach then taken to temporary release. By minute dated 4 May 2018, Churchman J allowed the two proceedings to be heard together on this point.[2]

[7] As matters transpired however, the evidence filed by the Department in response to Mr Taylor's application demonstrates an individual, merits-based decision was taken in December 2014 on his continued participation in RTW. While not formally abandoning his application to the extent it is based on the alleged blanket approach, Mr Taylor filed an amended pleading during the hearing, limiting that aspect of his claim before me to alleged specific deficiencies in the December 2014 decision-making, even if it had been made on an individualised basis.[3] Despite the two sets of proceedings not overlapping to the extent first envisaged, given this aspect of Mr Taylor's claim was fully briefed and ready to be heard, it was agreed I would hear it at the same time as Mr Smith's claim.

Statutory background

[8] The Chief Executive of the Department is provided with specific functions and powers by the Act.[4] Among these powers and functions are that the Chief Executive

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2 Other aspects of Mr Taylor's application (specifically his application to judicially review Serco New Zealand Ltd's decisions on more recent applications by Mr Taylor to go on RTW) will be heard at a later date.

3 As a result, Mr Taylor's amended pleading seeks an order quashing the 11 December 2014 decision only.

4 Corrections Act 2004, s 8.

must ensure the corrections system operates in accordance with the purposes and principles of the Act,[5] which are contained in ss 5 and 6 respectively.

[9] Section 5 states that "[t]he purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society". The section lists specific means by which that purpose is to be achieved, relevantly including:

(a) Ensuring that sentences are "administered in a safe, secure, humane and effective manner";[6]

(b) "[P]roviding for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act …";[7] and

(c) "[A]ssisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions".[8]

[10] The principles of the Act, "that guide the operation of the corrections system", are couched in greater specificity than the above purposes.[9] The Chief Executive's "paramount consideration" is "the maintenance of public safety".[10] Other principles listed in the Act, as far as they are relevant in this case, include:

(a) That "the corrections system must ensure the fair treatment of persons under control or supervision".[11] One way in which it must do so is by "ensuring that decisions about those persons are taken in a fair and reasonable way";[12]

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5 Section 8(1)(a).
6 Section 5(1)(a).
7 Section 5(1)(b).
8 Section 5(1)(c)
9 Section 6(1).
10 Section 6(1)(a).
11 Section 6(1)(f).
12 Section 6(1)(f)(ii).

(b) That "sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision";[13] and

(c) The provision of "access to activities that may contribute to" an offender's "rehabilitation and reintegration into the community", but only "so far as is reasonable and practicable in the circumstances within the resources available".[14]

[11] Another of the powers and functions entrusted to the Chief Executive under s 8 of the Act is "exercising the powers conferred by section 62 (which relates to the temporary release or removal of prisoners)".[15] Given its centrality to the present proceedings, it is worthwhile setting out s 62 in full:[16]

> **62 Temporary release from custody or temporary removal from prison**
>
> (1) This section applies to every prisoner who is a member of a class of prisoners specified in regulations made under this Act as a class of prisoners who may be—
>
> (a) temporarily released from custody under this section; or
>
> (b) temporarily removed from prison under this section while remaining in custody under the control or supervision of an officer, staff member, or probation officer during the period of removal.
>
> (2) The chief executive may give authority for the temporary release from custody or temporary removal from prison of a prisoner to whom this section applies—
>
> (a) for any purpose specified in regulations made under this Act that the chief executive considers will facilitate the achievement of 1 or more of the following objectives:
>
> (i) the rehabilitation of the prisoner and his or her successful reintegration into the community (whether

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13 Section 6(1)(g).
14 Section 6(1)(h).
15 Section 8(1)(d).
16 Temporary release and temporary removal are different. Temporary release involves a temporary release from custody. Temporary removal is more restrictive, and involves the temporary removal from prison but remaining, as the section notes, "in custody under the control or supervision" of Department personnel during the period of removal.

through release to work (including self-employment), to attend programmes, or otherwise):

(ii) the compassionate or humane treatment of the prisoner or his or her family:

(iii) furthering the interests of justice; or

(b) in any circumstances that, in the opinion of the chief executive, are exceptional and that will facilitate the achievement of 1 or more of the objectives described in paragraph (a).

(3) In exercising the powers conferred by subsection (2), the chief executive must consider—

(a) whether the release or removal of the prisoner might pose an undue risk to the safety of the community while the prisoner is outside the prison:

(b) the extent to which the prisoner should be supervised or monitored while outside the prison:

(c) the benefits to the prisoner and the community of removal or release in facilitating the reintegration of the prisoner into the community:

(d) whether removal or release would undermine the integrity of any sentence being served by the prisoner.

[12] Those matters set out at s 62(3) are accordingly mandatory relevant considerations to be taken into account in the exercise of the discretionary power to authorise temporary release.

[13] The Chief Executive delegates the authority to make decisions relating to temporary release or removal under s 62 to appropriate individuals within the Department.[17] The Chief Executive is also empowered by s 8(1)(j) of the Act to issue "guidelines" under s 196(1)(a) of the Act on the exercise of powers under the Act.[18] There is no dispute this includes issuing guidelines on the power to authorise temporary release or removal under s 62.

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17 Pursuant to s 41 of the State Sector Act 1988. The powers held by the Chief Executive in relation to temporary release are not among the list of non-delegable powers and functions in s 10 of the Corrections Act 2004. Those with delegated authority to make decisions on temporary releases or removals under s 62 of the Act are set out in the "Delegations Table – Schedule 4: Offender Management Prisons, Rehabilitation and Employment."

18 Pursuant to ss 8(1)(j) and 196(1)(b), the Chief Executive is also empowered to issue "instructions or guidelines" relating to procedures to be followed or standards to be met in relation to certain matters.

[14] The Corrections Regulations 2005 (the Regulations) are the relevant "regulations" specified in s 62(1) and (2) of the Act. At the relevant time,[19] reg 26 provided for the *classes* of prisoners who were eligible for consideration for temporary release, while reg 27 provided for the *purposes* for which eligible prisoners may be temporarily released. Again, these regulations are of central relevance to these proceedings and are accordingly set out below.

[15] Regulation 26 relevantly provides as follows:

> **26 Classes of prisoners who may be temporarily released under section 62**
>
> (1) The following classes of prisoners may be temporarily released under section 62 of the Act:
>
> (a) every prisoner (other than a service prisoner) sentenced to imprisonment for a term exceeding 24 months who has reached his or her parole eligibility date under section 20 of the Parole Act 2002; and-
>
> (i) who is assigned a security classification that reflects the lowest level of risk category; or
>
> (ii) who is assigned a security classification that reflects the second or third lowest level of risk category and who has been directed by the Parole Board to be released on parole under section 28 of the Parole Act 2002:
>
> (b) every prisoner (other than a service prisoner) sentenced to imprisonment for a term of 24 months or less who is assigned a security classification that reflects the lowest level of risk category:
>
> (c) every prisoner (other than a service prisoner) who, before 1 July 2002, was sentenced to imprisonment for a serious violent offence who-
>
> (i) is not eligible for parole but whose formal release date is within the next 12 months; and
>
> (ii) is assigned a security classification that reflects the lowest level of risk category:
>
> (d) every prisoner whose release is required for the purpose specified in regulation 29(2)(b) and who consents to being released for that purpose:

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[19] Regulation 27 was revoked on 17 September 2017 by the Corrections Amendment Regulations (No 2) 2017, but was in force at the time the relevant guidelines issued.

(e) every prisoner whose release is required for the purpose specified in regulation 29(2)(c).

…

[16] The purposes for such releases were stated in reg 27 as follows:

27 Purposes for which eligible prisoners may be temporarily released under section 62

A prisoner who is eligible to be temporarily released under section 62 may be temporarily released for any of the following purposes that the chief executive considers will facilitate 1 or more of the objectives specified in section 62(2)(a) of the Act:

(a) to visit the prisoner's family:

(b) to undertake paid employment (including self-employment):

(c) to seek employment (whether directly with a prospective employer or through an agency) or to receive vocational or other training:

(d) to attend any agency for assessment or treatment of the prisoner's rehabilitative or reintegrative needs:

(e) if the prisoner's release is imminent, to visit a department of State or other agency to make arrangements for the prisoner's release:

(f) to visit a community facility for educational, cultural, or recreational purposes:

(g) to visit a member of the prisoner's family, or a close friend who is-

(i) seriously ill; or

(ii) incapacitated:

(ga) to accompany a seriously ill member of the prisoner's family to medical treatment, and support the family member at the treatment:

(h) to attend the funeral, tangi, or subsequent ceremonial commemoration of the death (for example, the unveiling of a headstone) of a family member or close friend:

(i) to attend a religious service or a religious activity:

(j) to attend a restorative justice conference:

(k) to attend a family group conference:

(l) to obtain, whether by appointment or otherwise, medical, surgical, or dental assessment or treatment that is not available in the prison:

(m) to be admitted to hospital for treatment:

> (n) to have a tattoo removed (including any pre-procedure assessments and post-procedure checks):
>
> (o) to enable the prisoner to give birth to a child, or attend the birth of the prisoner's own child, or visit the prisoner's own newborn child:
>
> (p) if the prisoner's release is imminent, to obtain from family or friends personal property where this cannot be done by other means and the property is reasonably required before the prisoner's release:
>
> (q) if the prisoner's release is imminent, to purchase clothing which is reasonably required before the prisoner's release:
>
> (r) to be involved in a community project or other reintegrative activity in association with staff or members of service clubs, religions or cultural groups, or other community organisations:
>
> (s) to participate in an outdoor pursuit activity:
>
> (t) to participate in a sports team, or play sport as a member of a club or team participating in a local competition, or attend a sporting event as a spectator:
>
> (u) to assist the Police in relation to the prevention, investigation, and detection of offences:
>
> (v) to enable the Police to exercise powers under section 32 or 33 of the Policing Act 2008.

The guidelines in issue

The temporary release decision

[17] Two days after Mr Smith's failure to return from temporary release, on 11 November 2014, the Chief Executive sent an email to relevant Department staff in which he communicated his decision to provisionally suspend the temporary release of prisoners while a review of processes and policies was undertaken (the "11 November Decision"). The email addressed the availability of and changed the delegation level for decisions about temporary release. The text of the email is set out in full:

> I want to update you on Philip John Smith, a prisoner from Spring Hill Corrections Facility, who absconded from home leave last Thursday. You will all have been following this closely and be aware that he has fled overseas.
>
> This is a very serious incident. It should never have happened and I want you to know what steps we are taking to understand how it happened and to prevent it happening again.

> Earlier today, I spoke to our Regional Commissioners and we have agreed to cease the temporary release of prisoners. This will be in force for at least the next two weeks, while we complete a comprehensive review of our processes and look at where we need to tighten our policies.
>
> The only exception will be prisoners involved in Release to Work and those released to supervised programmes, such as the Salisbury Street Foundation. For prisoners who have special circumstances, e.g. a family bereavement or tangi, escorted temporary removal is still available as an option.
>
> The delegation for release has been lifted to Regional Commissioner. If you have a prisoner with exceptional circumstances who still requires temporary release, e.g. compassionate grounds, this must be approved by your Regional Commissioner.
>
> Our National Commissioner and Regional Commissioners have already introduced temporary changes and it is likely that further modifications to our processes will be made over the next week.
>
> Chief Custodial Officer Neil Beales has begun an operational review into this specific incident, and more generally into the temporary release process. This review and wider investigations that are underway will answer the questions being raised, including why Phillip John Smith was allowed out, how he obtained a passport and how he managed to get out of the country.
>
> I want these answers too, but for now; this has happened; it can't be undone, so we need to fix it and learn from it.

[18] The effect of the 11 November Decision was accordingly that:

(a) Subject to certain exceptions, all temporary releases were suspended. Such suspension was said to be for at least two weeks while a comprehensive review of the Department's processes was carried out;

(b) Exceptions to the suspension were:

(i) Prisoners involved in RTW programmes;

(ii) Prisoners released to supervised programmes; and

(iii) Exceptional circumstances, though no further guidance was given around this; and

(c) The delegation for temporary release under exceptional circumstances was lifted to Regional Commissioner level.

Temporary release circulars

[19] Following the 11 November Decision, the National Commissioner issued guidelines under s 196 of the Act (in the form of circulars) that also affected temporary release.[20] Circulars (2014/02, 2014/02A and 2014/02B) were issued on 12 November 2014, 14 November 2014 and 3 February 2015 respectively (the "temporary release circulars").[21] The text of the first circular is set out in full in Schedule 1 to this judgment. The key aspects of the circular are reproduced below:

> On 11 November 2014 the Chief Executive, in consultation with the National and Regional Commissioners, directed all temporary release of prisoners will cease pending a comprehensive review of the temporary release processes and policies.
>
> The only exceptions will be approval for prisoners involved in Release to Work and those related to supervised programmes, or when exceptional circumstances apply. For prisoners who have special circumstances, e.g. a family bereavement or tangi, escorted temporary removal is still available as an option.
>
> **Exceptional Circumstances Eligibility Criteria**
>
> Prisoners may only be considered for temporary release in exceptional circumstances if they have a minimum security classification and are serving a sentence of:
>
> - 24 months or less, or
> - More than 24 months and the NZ Parole Board has specified a release date.
>
> For prisoners who do not meet the exceptional circumstance criteria the prison manager must consider the option of the prisoner being escorted (temporarily removal).
>
> **Authority to approve temporary release in Exceptional Circumstances**
>
> The delegation for temporary release for prisoners where exceptional circumstances apply has been lifted to Regional Commissioner. All prisoners with exceptional circumstances that may require temporary release e.g. compassionate grounds, must be approved by your Regional Commissioner.
>
> Temporary releases for prisoners where there are exceptional circumstances will be limited to a maximum 12 hour period. If the Regional Commissioner supports a longer period they must obtain the support from the National Commissioner.

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20 Each of the guidelines was, however, described in its header as "Instructions".

21 The three versions of the circular were broadly in the same terms, and the (minor) changes through the iterations are not relevant for present purposes.

> Prison Managers must review and confirm the suitability of applications for temporary release before they are referred to the Regional Commissioner for consideration.
>
> **GPS Monitoring Condition**
>
> Prior to an application for temporary release for prisoners where exceptional circumstances exist is referred to the Regional Commissioner, it will be necessary for the Prison Manager to first consider if the prisoner should be subject to a condition of GPS monitoring (refer Use of GPS technology with Prisoners on Temporary Release for further information relating to GPS).
>
> Prison Managers must advise their Regional Commissioner of their reasons for supporting or not, the prisoner to be subject to GPS monitoring. The Regional Commissioner may direct that a prisoner be subject to GPS monitoring during the temporary release if they consider it necessary.
>
> The following prisoners should be subject to a condition of GPS monitoring during their temporary release, unless the Regional Commissioner is satisfied it is not necessary or is not practicable, in which case they should decline the temporary release:
>
> - Child sex offenders subject to an indeterminate sentence.
> - Offenders subject to a finite sentence who are likely to be suitable for an Extended Supervision Order or where the Department has applied for such an order.
> - Other sexual offenders subject to an indeterminate sentence.
> - Violent Offenders subject to an indeterminate sentence.

The "release to work" circulars

[20] Specific circulars (2014/03 and 2014/03A) were also issued on 21 November and 1 December 2014 respectively in relation to RTW (the "RTW circulars").[22] The full text of the 21 November 2014 circular is set out in Schedule 2 to this judgment. Key aspects of the RTW circular included the following:

> **Authority:** These instructions constitute the Chief Executive Guidelines issued in accordance with section 196(1)(a) of the Corrections Act 2004 for the management of prisoners temporarily released for the purpose of employment under sections 62 and 63 of the Corrections Act 2004.
>
> These instructions are in addition to the instructions contained in the Prison Operations Manual M.04.07 Release to work section and override any contradicting instructions contained in that section.
>
> **Duration**: These instructions will remain in force until the Prison Operations Manual has been reviewed or the Chief Executive revokes them.

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[22] Again, these circulars were described on their face as "Instructions" rather than "guidelines". Like the temporary release circulars, the two versions of the RTW circulars were in very similar terms and the changes between the two are not relevant to the present applications.

Purpose

These instructions specify the interim procedures to be followed by Corrections staff responsible for managing prisoners currently approved, or who are being considered, for temporary release for the purpose of employment (Release to Work).

Background

Prisoners approved for Release to Work are not included in the Chief Executive direction issued on 11 November 2014 that all temporary release of prisoners will cease, unless there are exceptional circumstances, pending a comprehensive review of the temporary release processes and policies.

Pending this instruction, the National Commissioner directed that all Prison Managers should review the conditions of prisoners involved in Release to Work and assess whether the prisoner should be subject to GPS monitoring during their temporary release, if not already specified.

The location of a prisoner's employment may not be suited to the application of a condition of GPS monitoring during the prisoner's release. In these instances Prison Managers have imposed other additional monitoring requirements (random telephones calls from the prison and increased site visits from Corrections Staff) and the frequency they occur.

To ensure there is consistency with the management of prisoners outside the secure perimeter, the following interim instructions, that align with the Temporary Release interim procedures (National Circular 2014 02A), will apply to all prisoners currently approved, or who are being considered, for Release to Work.

Release to Work Eligibility Criteria

Prisoners may only be considered for Release to work if they meet the eligibility criteria set out in M.04.07.01 Eligibility criteria. If there are any concerns that the prisoner still poses a risk to the community the application for Release to Work must not be approved, in particular where the Court has indicated a significant risk, including:

- Child sex offenders subject to an indeterminate sentence.
- Offenders subject to a finite sentence who are likely to be suitable for an Extended Supervision Order or where the Department has applied for such an order.
- Other sexual offenders subject to an indeterminate sentence.
- Violent offenders subject to an indeterminate sentence.
- Violent/sexual offenders sentenced to a term of more than two years who have not addressed their offending by completing a rehabilitative programme.

GPS Monitoring Condition

Prior to approving the prisoner for Release to Work the Prison Manager should assess whether the prisoner should be subject to GPS monitoring release (refer Use of GPS technology with Prisoners on Temporary Release for further information relating to GPS) during their release.

> If the Prison Manager does not consider it necessary for a condition of GPS monitoring to apply during the prisoner's release they must record their reasons on the M.04.07.Form.01 RTW application and assessment.

Post-circular statistics

[21] Evidence was adduced by the Department of the actual numbers of prisoners authorised for temporary release, including for RTW, in the periods immediately prior to and following Mr Smith's escape. The statistics can be summarised in a variety of ways. Mr Smith included the following tables in his submissions, based on the statistical evidence adduced by the Department:

Temporary release numbers by sentence type – 12-11-13 to 19-10-15

Offender Sentence Type	**12-11-13 to 11-11-14**	**12-11-14 to 19-10-15**	**12-11-14 to 19-10-15 % Decrease**
Finite sentence (excl CSO, ESO)	978	23	97.6%
Finite sentence CSO	139	0	100%
Finite sentence (subsequent ESO)	7	0	100%
Indeterminate sentence Life	355	12	96.6%
Indeterminate sentence PD	143	2	98.6%
Total	**1622**	**37**	**97.7%**

RTW numbers by offender's sentence type – 12-11-13 to 19-10-15

Offender Sentence Type	**12-11-13 to 11-11-14**	**12-11-14 to 19-10-15**	**12-11-14 to 19-10-15 % Decrease**
Finite sentence (excl CSO, ESO)	2673	1277	52.2%
Finite sentence CSO	312	117	62.5%
Finite sentence (subsequent ESO)	0	0	0.0%
Indeterminate sentence Life	507	160	68.4%
Indeterminate sentence PD	157	52	66.9%
Total	**3649**	**1606**	**56.0%**

[22] The Government Inquiry report into Mr Smith's escape also records that the number of prisoners released to work following Mr Smith's escape to the time of the report (August 2015) decreased from 443 to 264, and the number of "reintegrative releases" decreased from 214 prisoners in the six months prior to Mr Smith's escape to zero in the period following.[23]

[23] I comment on the relevance of such statistical evidence later in this judgment.[24]

Further facts particular to Mr Taylor's case

[24] As noted earlier, Mr Taylor has participated in several programmes while in prison, including RTW. At the time of Mr Smith's escape, Mr Taylor was participating in RTW.

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[23] *Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor*, August 2015, at [5.9.1].

[24] See [47] below.

[25] Following Mr Smith's escape, high risk prisoners who were on the RTW programme were reviewed. Initially (on around 19 or 20 November 2014), Mr Lightbown, the Prison Director at Spring Hill Prison where Mr Taylor was serving his sentence, decided Mr Taylor should remain on RTW. Following the 21 November 2014 RTW circular, however, he reviewed the position in relation to prisoners serving indeterminate sentences (including Mr Taylor). Without forming a final view, Mr Lightbown decided to temporarily suspend Mr Taylor's RTW pending completion of the review.

[26] An Advisory Panel was then set up at Spring Hill to consider, among other things, recommendations about RTW. On 4 December 2014, and after hearing from the Panel, Mr Lightbown decided to defer a decision about Mr Taylor's RTW application until 11 December 2014. Mr Taylor appeared before the Parole Board in the intervening period (on 10 December 2014) and was declined parole.

[27] The Advisory Panel at Spring Hill reconvened on 11 December 2014 and Mr Taylor's RTW status was again discussed. Mr Lightbown was again the decision-maker on that day. At the conclusion of the meeting, he declined Mr Taylor's application to participate again in RTW. It is this decision which is now the subject of Mr Taylor's application (at least for the purposes of this judgment).

[28] Later applications by Mr Taylor for RTW have been declined and, at least at the time of the hearing before me, the operative decision concerning Mr Taylor's application to go on RTW (which was declined) was made on 15 February 2018.

[29] I address Mr Lightbown's decision of 11 December 2014 in further detail later in this judgment, when considering Mr Taylor's challenge to that decision.

Mr Smith's claim

Mr Smith's submissions - summary

[30] Mr Smith pleads two causes of action. He says the 11 November Decision, together with the temporary release and RTW circulars, were ultra vires and/or an

unlawful act of dictation — that had the unlawful effect of fettering a decision-maker's exercise of discretion on individual applications for temporary release.

[31] Mr Smith's submissions on the first cause of action address each of the 11 November Decision and circulars separately. But in many respects his arguments as to why the decision and circulars were unlawful are aligned and may be outlined in broad terms.

[32] Mr Smith argues that s 62 of the Act is clear that "every prisoner" that is a member of the class of prisoners specified in regulations may be temporarily released. The power to make such regulations rests with the Governor-General.[25] Mr Smith submits that the 11 November Decision and the circulars issued under s 196 must be within the scope of this empowering legislation.[26] Mr Smith accepts there is no entitlement to be granted temporary release, but submits there is an entitlement to at least be considered. Mr Smith says when the eligibility of prisoners for release under the regulations are compared with those under the 11 November Decision and follow up circulars, many classes of prisoner eligible for consideration for temporary release under reg 26 were simply excluded. Mr Smith submits that nothing in ss 8, 62, 196, 200 or 202 of the Act authorised the Chief Executive to restrict the class of prisoners who may be released under reg 26.

[33] Mr Smith also submits the effect of the 11 November Decision and circulars was ultra vires the *purposes* of temporary release, as listed in reg 27. He argues the effect was a blanket ban on 21 purposes for which temporary release *may* be approved under that regulation. This was, he submits, a breach of the common law principle that subordinate legislation designed to regulate an activity cannot impose a total prohibition on that activity.[27] Even if it is the case that these decisions were necessary or reasonable in the context of the paramount consideration of public safety, Mr Smith says they were still required to be made intra vires. He submits that reading the relevant sections in light of the broader purposes and principles of the Act does not make the decisions intra vires because those purposes equally include the aim of

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25 Corrections Act 2004, ss 200 and 202.
26 Citing a decision of Gilbert J in *Taylor v Manager of Auckland Prison* [2012] NZHC 3591.
27 Relying on *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).

prisoner reintegration and rehabilitation. He points towards evidence from the Government Inquiry into his escape that suggests there was no great danger to the public as a result of his escape and as such, submits this purpose ought not to be exaggerated.

[34] Mr Smith's second cause of action rests on the principles that a general "policy cannot deny the power which the law has conferred"[28] and that a decision-maker cannot surrender his discretion by acting under the dictation of another. Mr Smith submits the 11 November Decision, amplified by the circulars, was an unlawful act of dictation, as a result of which delegates of the Chief Executive's powers simply acted under the alleged dictation. Mr Smith says that the 11 November Decision and circulars actually fettered the exercise of discretion can be inferred from both the terms of the 11 November Decision and the circulars themselves, and also the statistical evidence referred to earlier.

[35] Mr Smith also made submissions on relief. He accepts the matters now being challenged occurred some years ago and have since been replaced with a new temporary release and RTW regime.[29] He nevertheless submits that if either cause of action is established then the relief sought (a formal declaration of invalidity) should be granted. He refers to authorities which emphasise formal declarations of invalidity are appropriate to mark a substantial breach of law. He also relies on authorities to the effect that a declaration to inform future decision-making is especially important in the corrections context, there being public interest in the Court addressing allegations that prisoners have been subject to unlawful decision-making.[30]

Department's submissions in relation to Mr Smith - summary

[36] In response to Mr Smith's claims, Ms Todd, senior counsel for the Department, submits the 11 November Decision and the subsequent circulars go hand in hand. The

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28 *Westhaven Shellfish Ltd v Chief Executive, Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [48].

29 On this point, Mr Smith and the Department do not agree on the duration of the suspension and circulars, but on both views, they were replaced by a new temporary release regime in October 2015 (on the Department's argument) or December 2016 (on Mr Smith's argument).

30 Referring to decisions such as *Taylor v Attorney-General* [2013] NZHC 1659 and *Smith v Attorney-General* [2017] NZHC 136.

latter provided guidance and elaboration that the former could not and thus they must be examined together.

[37] The Department says Mr Smith's claims rest on the proposition that the 11 November Decision and circulars which followed were unduly rigid; they dictated how decision-makers should exercise their discretion in a way that was impermissible and were thus themselves unlawful. The Department states that another way of putting that proposition is that they were ultra vires, though says that does not add in a substantive sense to the argument. The Department further submits that the suggestion the 11 November Decision and/or circular were ultra vires ss 200 and 202 of the Act (which provide for the making of regulations under the Act) wrongly proceeds on the basis the circulars in particular were, or were akin to, regulations or some other form of subordinate legislation.

[38] Underlying the Department's arguments that the 11 November Decision and circulars were intra vires and not an unlawful act of dictation is the submission that the effect of the decision and circulars was not the unlawful *exclusion* of certain classes from consideration for temporary release, but was the lawful *deferral* of the discretion to grant temporary release for certain classes (until a complete investigation had been undertaken into Mr Smith's escape). This, it is submitted, was an entirely permissible course of action — it was consistent with the Chief Executive's broad discretion to authorise release under s 62, the mandatory considerations in exercising that decision (particularly the "paramount consideration", public safety), and it occurred through an authorised use of the s 196 guidelines procedure and the Chief Executive's ability to delegate decisions.

[39] The Department submits this deferral made no attempt to reverse or contradict legislative or regulatory classes or purposes, and the exceptions identified in the circulars meant temporary release remained available in appropriate circumstances. Because of that availability, the Department submits the scheme was still able to facilitate the rehabilitative and reintegrative purposes of temporary releases.

[40] The Department takes two positions on issues of relief. First, even if the causes of action are made out, its position is that relief should not be granted. Second, if the

Court took a contrary position, the Department submits that any declarations can only relate to the 11 November Decision and circulars themselves, and not to any of the individual decisions made in respect of temporary release during the period in which the decision and/or circulars were active.

[41] On the first of these points, the Department submits relief must be of potential practical value. It says there is no live controversy between the parties now, so any declaration would be of limited utility. That is because this was a deferral of aspects of the exercise of power under s 62 of the Act and the scheme is no longer in force. The Department further says that the wider or precedential value of any declaration is likely to be limited, because it is highly unlikely similar circumstances will arise in the future. Finally, it notes these issues have already been ventilated in a public forum as a result of the Government Inquiry.

[42] On the second point of relief, the Department submits any declarations which might be made must be "appropriately constrained" so to reflect the lawfulness of the decision and circulars themselves, but *not* individual decisions made in respect of prisoners during the times of those circulars. That is for two reasons. The Department says the legality of the 11 November Decision and circulars cannot be determinative of the legality of individual decisions made under them. And declarations in public law should be of practical utility and fact-specific, not academic, hypothetical and theoretical. The Department notes that other than in the case of Mr Taylor, individual decisions in respect of particular prisoners are *not* the subject of Mr Smith's pleading, the prisoners concerned are not parties to the proceedings, and the evidence is not directed to specific decisions in any event.

Mr Smith's application - approach

[43] I have found it helpful first to consider whether the 11 November Decision and circulars dictated an impermissible exercise of discretion and were thus unlawful. If the 11 November Decision and circulars dictated the exercise of discretion in a way that was *impermissible*, then it follows that they were ultra vires, being beyond the

powers entrusted to the Chief Executive (and his delegates) under the Act.[31] In that sense, I accept Ms Todd's submission that whether the argument is framed as an unlawful dictation or ultra vires is a matter of terminology. Having considered the arguments in this context, I will then consider any residual points on the basis that ultra vires is also advanced by Mr Smith as a stand-alone ground for review.

Unlawful dictation – legal principles

[44] The 11 November Decision and circulars are analogous to policy which is issued in order to guide actions taken under the same powers more than occasionally. As the author of *Judicial Review: A New Zealand Perspective* observes, this is both desirable (to ensure consistency) and necessary (to control delegated authorities).[32] As such, it is well established that it is proper for decision-makers to develop polices to inform the exercise of a discretion.[33]

[45] The relevant legal principles concerning policies issued to guide the exercise of discretionary powers are not in dispute and can be briefly stated:

(a) First, the exercise of a discretionary power calls for an "individualised response"[34] not "slavish adherence" to a rule.[35]

(b) Second, the policy cannot deny the power which the law has conferred.[36]

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31 As discussed in Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [67.1.1], any statutory decision or action which, for a range of reasons, goes beyond the powers conferred by the statute or is improper can be said to be "ultra vires".

32 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis NZ, Wellington, 2018) at [15.74]. See similar observations in Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [23.3.2(2)].

33 *Criminal Bar Association of New Zealand Inc v Attorney General* [2013] NZCA 176 at [118]-[119].

34 *Bovaird v J* [2008] NZCA 325 at [52].

35 *Hopman v Complaints Assessment Committee* HC Wellington CIV-2005-485-1023, 14 February 2007 at [27].

36 *Westhaven Shellfish Ltd v Chief Executive, Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [48].

(c) Third, a policy must be consistent with the underlying statutory power.[37]

(d) Fourth, a policy may properly admit exceptions, but will unlawfully fetter discretion where the test for departing from the policy sets the bar so high so as to be an unacceptable limit on the exercise of discretion.[38]

(e) Fifth, the public interest, or the "reasonableness" of a particular approach, will not save a policy that is improperly cast in mandatory terms.[39]

(f) Sixth, if a decision-maker adopts a fixed rule of policy, it may be no answer that it followed a practice of allowing exceptions to the rule.[40]

(g) Finally, a policy must be based on the factors and purposes relevant to the power and must not be unreasonable.[41]

[46] The distinction between lawful guidance on the exercise of discretion and unlawful dictation can be a fine one.[42]

[47] In determining whether a policy amounts to lawful guidance or impermissible dictation, the policy must be considered in light of its contents as a whole and in accordance with the natural and ordinary meaning of the words used.[43] It is to be construed in the context in which it was issued[44] and having regard to its purpose and underlying objective.[45] Importantly in the context of the present case (given both

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37 *Tauranga Boys College of Trustees v International Education Appeal Authority* [2016] NZHC 1381 at [20]; *Haronga Jnr v Waitangi Tribunal* [2010] NZCA 201 at [44].

38 *Criminal Bar Association of New Zealand Inc v Attorney General* [2013] NZCA 176 at [121].

39 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [23.3.2(1)].

40 *Attorney-General, ex rel Tilley v Wandsworth London Borough Council* [1981] 1 WLR 854 at 858 per Templeman LJ.

41 *Works Civil Construction Ltd v Accident Rehabilitation and Compensation Insurance Corporation* [2001] 1 NZLR 721.

42 See, for example, the divergent views of the Divisional Court and Court of Appeal referred to in *Re Findlay* [1985] AC 318 (HL) at 325-326; though the House of Lords was unanimous in its conclusion that the policy in that case was lawful.

43 *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48 at [10].

44 *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 P&CR 334 (CA) at 345.

45 *Patel v Chief Executive of Department of Labour* [1997] NZAR 264 (CA) at 271.

parties' reliance on statistical evidence of temporary release authorisations both before and after Mr Smith's escape), the interpretation of a policy is to be determined without reference to the way in which it may have been applied in individual cases or inferences to this effect. In *Attorney General v Refugee Council of New Zealand Inc* the Court of Appeal stated:[46]

> …it is not appropriate, when considering the lawfulness of the instruction as such, to be influenced by how immigration officers may have dealt with individual cases. The lawfulness of the instruction must depend on a proper construction of its terms rather than on inferences as to how it may have been interpreted by individual officers in individual cases.

Unlawful dictation – discussion

[48] I have reached the conclusion that the 11 November Decision was lawful, but the circulars which followed it were not. I address each in turn.

11 November Decision

[49] The guidance given in the 11 November Decision must be considered as a whole, in its proper context and against the terms and purpose of the underlying statutory provisions.

[50] Plainly Mr Smith's escape while on temporary release raised serious concerns on the part of the Chief Executive and others within the Department of Corrections, until they knew just how and why the escape had occurred. Pursuant to s 62(3) of the Act, when considering temporary release, the Chief Executive and his delegates are required to take into account, amongst other matters, whether the release or removal of a prisoner might pose an undue risk to the safety of the community. It was not unlawful or improper, in the circumstances then facing the Chief Executive, to place significant weight on that factor, particularly given maintenance of public safety is the paramount consideration in decisions about the management of persons under control

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[46] *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [30]. I acknowledge that in *Criminal Bar Association of New Zealand Inc v Attorney General* [2013] NZCA 176, the Court of Appeal did refer to and appear to place some reliance on post-policy statistical evidence. That was, however, as an illustration of the Court's view, based on the policy itself and the statutory framework, that the policy crossed the line into impermissible dictation. See [87], [110], [121]-[122] and [125].

or supervision.[47] Further, on its terms, the 11 November Decision did not itself exclude certain classes of prisoners from *any* consideration for temporary release. While the guidance was framed as a suspension with two primary exceptions (being prisoners on RTW and supervised programmes), as noted at [18] above, it also left open consideration of temporary release for eligible prisoners in "exceptional circumstances". In such a case, the delegation level was lifted to Regional Commissioner (about which no issue is taken), and an example only given, namely compassionate grounds.

[51] As Lord Scarman stated in *Re Findlay* (a case not greatly dissimilar to the present):[48]

> The question, therefore, is simply: did the new policy constitute a refusal to consider the cases of prisoners within the specified classes? The answer is clearly "no". Consideration of a case is not excluded by a policy which provides that exceptional circumstances or compelling reasons must be shown because of the weight to be attached to [factors which must be taken into account by the decision-maker].

[52] Accordingly, I do not consider the 11 November Decision unlawfully excluded from any consideration for temporary release classes of prisoners who were entitled to be so considered. In the circumstances then facing the Chief Executive, and given the review being undertaken, it was open to him to require exceptional circumstances to exist before temporary release could be authorised, given the weight to be given, inter alia, to risk to the community under ss 62(3)(a) and s 6(1)(a) of the Act.

[53] Further, even if the 11 November Decision was construed as a "refusal to consider" applications by otherwise eligible prisoners, it was stated as being for a short period of time only (of some two weeks). I do not consider this, in and of itself, would have been an impermissible exercise of dictation on the part of the Chief Executive. In the factual and statutory context in which the decision was made and guidance given, a short "pause", perhaps of a few weeks, on the exercise of the discretionary power under s 62 while the circumstances of Mr Smith's escape were examined would have been a reasonable and lawful exercise of the Chief Executive's broad discretion. Indeed, not to have paused for a short period to take stock could equally have been

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47 Corrections Act 2004, s 6(1)(a).
48 *Re Findlay* [1985] AC 318 (HL) at 336.

criticised as unreasonable, given it was not then known what weaknesses, if any, might have been found in the temporary release system.

Temporary release circulars

[54] I consider the position changed, however, with the issuance of the further guidance given in the temporary release circulars commencing the following day, 12 November 2014.

[55] Circular 2014/02 stated that it was "in addition to the instructions" contained in the relevant section of the Prison Operations Manual, which referred back to the various classes of prisoners set out in reg 26 to be eligible for consideration for temporary release.[49] Circular 2014/02 stated that it applied "over any contradicting instructions contained in that section" of the Prison Operations Manual. On its face, therefore, the circular did purport to "override" the content of the relevant section of the Prison Operations Manual, which included reference to reg 26 and those classes of prisoners eligible to be considered for temporary release.

[56] The circular set out three exceptions to the suspension of temporary release (namely prisoners on RTW, on supervised programmes and exceptional circumstances). The purpose of the circular was stated to be "to provide interim guidance to Corrections staff when temporary release is being considered for a prisoner whose circumstances are exceptional". As noted at [18] above, the Chief Executive's email of the previous day had provided for an exceptional circumstances exception, though gave no guidance around how that would be applied.

[57] The 12 November 2014 circular stated that "[p]risoners may only be considered for temporary release in exceptional circumstances" if they fell within a particular class. Importantly, that class was narrower than the class of prisoners eligible to be considered for temporary release under reg 26. In this way, the exceptional circumstances exception in this case is different to that in *Findlay*, which applied to all prisoners eligible for parole under the relevant statutory provisions. As a consequence of circular 2014/02, prisoners who were eligible for temporary release

[49] Section M04.06.01 of the Prison Operations Manual.

under reg 26, but did not fall within the circular's "eligibility criteria" for exceptional circumstances, or were not involved in RTW or supervised programmes, were excluded from any consideration for release.

[58] Recognising this, the Department's submission is, as noted, that in such cases, the exercise of the discretion was only *deferred*, rather than there being a refusal to exercise the discretion (or a direction that was inconsistent with the underlying legislation). I disagree. While as explained earlier, a short period of "deferral" could have been appropriate, the circular was open ended.

[59] I interpolate to note there is a dispute as to how long the temporary release circulars were in force. I do not consider that directly relevant, however, to their lawfulness. As noted above, the lawfulness of a policy is to be considered on the basis of its plain and ordinary meaning, in the context in which it was and having regard to its purpose and underlying objective. The actual (rather than stated) duration of a circular or similar policy does not assist or bear any direct light on those matters.[50] For example, a policy that is said to be in place for, say, three years, or issued on an open-ended basis, might be revoked two weeks later. That would not make the policy lawful if it had otherwise been unlawful.[51]

[60] Given the point was argued however, and for completeness, I accept the Department's submission that the position changed as of 19 October 2015 when the new temporary release regime came into being. Mr Smith's position that the temporary release circulars remained in force until December 2016 relies on a reference to circular 2014/02 remaining in the Schedule 4 delegations table until that date. The evidence before me, however, confirms that updated sections of the Prison Operations Manual on temporary release were issued on 19 October 2015. A frontline article was sent to all staff on the same day which confirmed the Prison Operations Manual had been updated in that way, as well as confirming the circulars were revoked. I am therefore satisfied that despite the "rogue" reference to circular 2014/02

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50 This is similar to the Court of Appeal eschewing reliance on post policy statistics in *Attorney-General v Refugee Council* [2003] 2 NZLR 577 (CA).

51 The duration may be relevant, however, to whether relief ought to be granted.

remaining in the delegations table, the substantive position had in fact changed by 19 October 2015.

[61] The point remains, however, that irrespective of whether the Department or Mr Smith is right on the duration point, the temporary release circulars were in force for a substantial period of time. The Government Inquiry report, issued in August 2015, described it as an "extended curtailment" which was "unfair to scores of prisoners".[52] To the extent the actual duration and post-circular statistics have any relevance, they confirm the effect the circulars had on actual temporary release decision-making over a not insignificant period of time.

[62] Turning back to why the "deferral" was an unlawful dictation, the circulars on their face excluded, on an open-ended basis, certain categories of prisoners who were entitled under reg 26 to be considered for temporary release, even on an "exceptional circumstances" basis. In the context of Mr Smith's escape, updated guidelines which tightened up the regime and directed particular emphasis on public safety would have been quite appropriate. In that context, I accept Mr Todd's submission that the circumstances of Mr Smith's escape could and should shape how the discretion to authorise temporary releases was exercised. Certain events will naturally affect the "risk calculus" of decisions being made under statutory discretion, and decision-makers cannot ignore that risk.[53] But the circulars crossed the line, in my view, into impermissible dictation.[54] Unlike in *Findlay*, the statutory regime in this case expressly mandated those categories of prisoners eligible for consideration for temporary release. No such eligible prisoner was entitled to temporary release, but I accept Mr Smith's submission that they were at least entitled to be considered.[55] It was not open to the Chief Executive to issue guidelines in quite concrete terms which directed delegated decision-makers that, in effect, their discretion could not be exercised at all in relation to those prisoners.

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52 *Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor*, August 2015, at [5.9].

53 *Attorney-General v Refugee Council* [2003] 2 NZLR 577 (CA) at [31].

54 *Criminal Bar Association of NZ Inc v Attorney-General* [2013] NZCA 176 at [91].

55 Dunningham J, in *Ericson v Chief Executive, Department of Corrections* [2015] NZHC 1157 at [22] observed that the applicant in that case had a right to apply for temporary release "and he has a right to have that application considered".

[63] Nor do I accept the Department's submission that the fact temporary removal remained available at all times ameliorated the situation. Temporary release and temporary removal are different things; the latter involves *escorted* removal from the prison environment. Section 62 of the Act deals with both temporary release and temporary removal. Regulations 26 and 27 were addressed to temporary release and regs 28 and 29 to temporary removal. Unlawful dictation in relation to temporary release cannot be saved by the presence of a similar, but different, regime for removal from the prison environment.

[64] The temporary release circulars were accordingly unlawful, in that they directed an impermissible exercise of discretion as to the classes of prisoners eligible for temporary release, inconsistent with the relevant statutory regime.

[65] I do not agree, however, that either the 11 November Decision or the temporary release circulars were unlawful because they curtailed the purposes for which temporary release could be granted. It is correct that reg 27 listed some 23 purposes for which temporary release may be granted. Neither the November Decision nor the temporary release circulars stated that RTW or supervised programmes were the *only* purposes for which temporary release could be granted. The exceptional circumstances exception did not itself exclude other purposes set out in reg 27 from being considered, and the reference to compassionate grounds was given as an example only.

[66] I turn now to the RTW circulars.

RTW circulars

[67] I have also reached the conclusion that the RTW circulars were unlawful.

[68] Starting with the statutory scheme, as noted, reg 26 mandates those classes of prisoners entitled to be considered for RTW. There is no entitlement or "bias" in favour of RTW, but the statutory regime plainly recognises the potential benefits of such a programme,[56] mirroring the purposes and principles of the Act.[57]

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56 Section 62(3)(c).
57 Sections 5(1)(c) and 6(1)(h).

[69] The key aspects of the RTW circulars are set out at [20] above. They commenced by noting that they overrode any contradicting instructions in the relevant section of the Prison Operations Manual.[58] They directed that "[i]f there are *any concerns* that the prisoner still poses *a risk to the community* the application for Release to Work *must not be approved*, in particular where the Court has indicated significant risk, including…." (emphasis added).

[70] Risk is inherent in serving prisoners being released into the community. Mr Lightfoot, the Deputy Chief Executive at the Department of Corrections, states in his affidavit that "risks … inevitably exist when a prisoner is outside of the wire". The RTW circulars accordingly, on their face, directed that if there was any concern that such a risk existed, the application "must not be approved". In my view, that directive removed the evaluative task of assessing applications on an individual basis, balancing all mandatory relevant considerations set out in s 62(3) of the Act.

[71] The position is compounded by the circulars' statement that if concerns of a risk remain, the applications must not be approved, "in particular where the Court has indicated a significant risk, including….". The circulars go on to list particular classes of offenders. This aspect of the circular is somewhat confusing. On one view, the circular was simply directing that a "hard look" be given to application by offenders in such classes. That would have been reasonable. The other view, however, is that when coupled with the directive that where there are concerns of a risk to the community applications "must not be approved", the classes of offenders which followed were cases in which such risk did remain. That is a realistic interpretation of the words used, in the context of the circular as a whole.[59] In my view, this combination of wording, with the directive that certain applications "must not be approved", again crossed the line into impermissible dictation.

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58 Section M04.07.

59 Which is not to suggest that it *was actually* interpreted in that way in any given case. Evidence produced in relation to Mr Taylor's application does, however, indicate this is how it was interpreted by the Inspector of Corrections when considering a complaint by Mr Taylor that his RTW had been revoked, noting, on the basis of the circular, that "you are a 'violent offender subject to an indeterminate sentence'. This means that you are no longer considered eligible for RTW employment." Similar comments were made on behalf of the Department in 2015 correspondence with Mr Taylor's legal counsel.

[72] In this context, the circulars can be contrasted with the policy or guidance considered by the full Court of Appeal in *Attorney-General v Refugee Council of New Zealand Inc*. That case considered the legality of policy, issued shortly after the 11 September attacks, guiding the discretion to detain those claiming refugee status at the border. Tipping J (giving judgment for himself, Blanchard and Anderson JJ) emphasised the need to consider the content of a policy as a whole.[60] Having examined the content of the policy, his Honour stated that the words seemed to suggest a presumption *against* detention, rather than a presumption going the other way.[61] Having then considered the detailed text of the policy and "importantly, the tenor of the document as a whole", Tipping J concluded that it could not be read as requiring an unlawful approach by immigration officers to their statutory power of deciding refugee claims at the border.[62] McGrath J expressed similar views, noting that while the policy in that case had a "precautionary theme", he detected "no bias towards detention".[63]

[73] In this case, the directive that in certain circumstances applications "must not be approved" did not reserve the possibility, when taking into account all relevant information, that an application might nevertheless be granted.[64] The overall tenor of the circulars is therefore quite different to the policy in issue in *Attorney-General v Refugee Council of New Zealand Inc*.

[74] I accordingly conclude the RTW circulars were an unlawful act of dictation, given they directed that applications of a certain class must not be approved.

Ultra vires as a stand-alone ground of review

[75] Given my conclusions above, the circulars were "ultra vires" in the broad sense that they went beyond the powers entrusted to the Chief Executive (and his delegates) under the Act. In that context, it is arguably unnecessary to consider whether the circulars were ultra vires in any narrower sense.

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60 *Attorney-General v Refugee Council* [2003] 2 NZLR 577 (CA) at [22].
61 At [24].
62 At [27].
63 At [120]. See also the judgment of Glazebrook J, at [282].
64 Similar to the policy in issue in *Westhaven Shellfish v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at [48]-[49] and [53].

[76] Mr Smith did submit, however, that the circulars were akin to regulations and thus fell foul of the common law principle that all subordinate legislation must be within the scope of its empowering Act.[65] In response to Ms Todd's submission that the circulars cannot be considered subordinate legislation for the purposes of these principles, Mr Smith says that on the basis of ss 37 to 39 of the Legislation Act 2012, the circulars were "disallowable instruments" and that under s 29 of the Interpretation Act 1999, a "disallowable instrument" under the Legislation Act 2012 is a regulation.

[77] I do not accept Mr Smith's submission that the circulars went beyond being mere guidelines to, in substance, becoming unlawful instruments for the purposes of the Legislation Act.

[78] The starting point is that the circulars were guidelines issued pursuant to s 196(1)(a) of the Act. Next, s 38 of the Legislation Act 2012 defines "disallowable instruments" as "an instrument made under an enactment" which (relevantly for present purposes) "has significant legislative effect". "Significant legislative effect" is in turn defined at s 39 as being where the effect of the instrument is to:

(a) create, alter or remove rights or obligations; *and*

(b) determine or alter the content of the law applying to the public or a class of public.

[79] The circulars in this case did not and cannot determine or alter the content of the law. While Mr Smith submits that is the effect they had (through individual decisions made on temporary release applications), there is no doubt they did not and could never determine or alter *the law* itself. Rather, they were and purported to be guidelines on the exercise of powers under the Act. They were "ultra vires" in the broader sense discussed earlier in this judgment. But they were not ultra vires by virtue of being subordinate legislation, in substance or form, which was inconsistent with the empowering legislation.

[80] Mr Smith's first cause of action is accordingly dismissed.

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[65] See, for example, *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62 (CA) at 67-68.

Individual decisions

[81] It is appropriate I observe that my conclusion as to the lawfulness of the temporary release and RTW circulars does not in and of itself say anything about the lawfulness of individual decisions taken on temporary release and RTW applications. Lord Dyson JSC, in *R (WL (Congo)) v Home Secretary* confirmed that the mere existence of an unlawful policy is not sufficient to establish that any particular exercise of a statutory direction is unlawful.[66] Similar statements were made in *Attorney-General v Refugee Council of New Zealand Inc*. The majority stated that whether a policy's interpretation or application in a particular case was unlawful will depend on a close consideration of the circumstances of that case against the legal requirements.[67] Tipping J went on to state:[68]

> The unlawfulness of the operational instruction, even if that were the correct view, would not per se inevitably mean that Ms Hodgins' treatment of D must have been unlawful. This case shows how difficult it is to deal appropriately with issues in the abstract and how important it almost is to consider issues of law against a concrete set of or sets of facts.

[82] McGrath J made similar observations:[69]

> Problems … are highly likely to arise where the proceedings seek to go beyond review of the terms of the policy statement itself to bring a representative proceeding to determine the rights of all those to whom it was applied over a given period. Such proceedings cannot readily be determined in the abstract, that is without reference to the particular circumstances of application of the official guidance.

[83] Glazebrook J took the same approach, stating that "any decision that the detention policy was unlawful would not necessarily effect the legality of particular individual detention decisions".[70]

[84] The above concerns were expressed in the context of the High Court in *Attorney-General v Refugee Council of New Zealand Inc* having considered a "global

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66 *R (WL (Congo)) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245 at [63].
67 *Attorney-General v Refugee Council* [2003] 2 NZLR 577 (CA) at [30].
68 At [45].
69 At [107].
70 At [301]. See also *R (WL (Congo)) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [63]; *R (Hicks) v Commissioner of Police of the Metropolis* [2012] EWHC 1947 (Admin) at [157]; and *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697 at [157].

and representative" approach to determining whether there were issues with how the relevant policy had been implemented. Tipping J stated:[71]

> We do not consider the Court should lend its aid to such an approach, the more so in respect of a period following a major adverse change in the international security climate. We do not think the High Court should have proceeded in the global representative way it did. In our judgment the Courts should confine their attention in relation to the actual implementation of the relevant statutory powers to individual cases where the particular facts can receive the necessary close examination. We therefore respectfully disagree with the Judge's generally and representative approach to this aspect of the case, and confine ourselves on the implementation front to the case of the second respondent, D, whose individual case is the only one before us.

[85] I make these observations as aspects of Mr Smith's evidence and submissions focuses on how he says the circulars were implemented in practice in relation to a small number of named prisoners (i.e. other than Mr Smith himself, or Mr Taylor). The primary purpose of Mr Smith adducing that evidence was to encourage the Court to draw "inferences" from how the circulars were implemented in practice, to the lawfulness of the circulars themselves. As noted, however, the Court of Appeal in *Attorney-General v Refugee Council of New Zealand Inc* was clear that such a process of "reverse engineering" was not permissible in interpreting or considering the legality of a policy.[72]

[86] In his written reply submissions, Mr Smith appears to suggest this Court could and ought to make declarations in relation to the temporary release decisions concerning the other named prisoners, about whom some evidence was adduced in his affidavit materials. In his oral submissions, Mr Smith accepted that an order in these proceedings to review any particular RTW decision where there is evidence that any one or more of the circulars had been taken into account was "somewhat ambitious". In my view, given the cautionary comments by the Court of Appeal in *Attorney-General v Refugee Council of New Zealand Inc,* that is a proper concession. Further and in any event, Mr Smith's statement of claim does not seek such relief or declarations. Nor, other than Mr Taylor, are any other parties before the Court.

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71 *Attorney-General v Refugee Council* [2003] 2 NZLR 577 (CA) at [32].
72 At [30]-[31].

[87] I accordingly say nothing further on what impact, if any, my findings on the lawfulness of the circulars might have on individual temporary release and/or RTW decisions.

Relief on Mr Smith's claim

[88] The final issue for consideration on Mr Smith's application is what relief, if any, ought to be granted.

[89] Mr Smith relies on the general proposition, summarised by Katz J in *Smith v Attorney-General,* that successful judicial review applicants are entitled to vindication, in particular via a declaration, unless there are special considerations to the contrary or extremely strong reasons for refusal.[73] Her Honour also noted that it is important that justice is seen to be done, and judicial review may serve as a deterrent function.[74]

[90] The Department does not challenge these observations as a matter of principle. It acknowledges there must be good grounds to decline relief having found an error of law, as formal and public recognition of unlawfulness can assist in upholding the rule of law. As noted, however, the Department says that generally a remedy will be granted only where it is capable of serving a useful purpose and will not be granted if it would be useless to do so. The Department points to the Court of Appeal's observations in *Department of Internal Affairs v Whitehouse Tavern* that there must be some practical consequence to the parties or to the broader public from proposed declaratory relief under the (then) Judicature Amendment Act.[75]

[91] I consider the matter finely balanced. There is no "live" controversy or dispute as between Mr Smith and the Department on the impact of what I have found to be the unlawful circulars. A new regime was implemented in October 2015 in relation to temporary release. Further, for the reasons set out at [81]-[86] above, any declaration

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73 *Smith v Attorney General* [2017] NZHC 136 at [152], referring to *Williams v Auckland Council* [2015] NZCA 479 at [99].

74 At [152].

75 *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398 at [80].

of invalidity of the circulars themselves does not necessarily taint any downstream individual decisions on temporary release.

[92] Nevertheless, I consider there is broad public interest in the Court ruling on the legality of guidelines or policy such as that in this case, and making formal declarations of invalidity if that is made out. As summarised at [44] above, there is nothing inherently unlawful in guidelines or policy being issued to guide the exercise of discretionary powers. Indeed, there are benefits from doing so. But the benefits will only be realised if the guidelines or policy, which may guide many individual decisions, are consistent with the underlying statutory regime and not otherwise an unlawful dictation or fetter on discretion. The findings of unlawfulness in this case are not merely technical errors. In the absence of consideration of individual decisions made on temporary release during the period the circulars in this case were in effect, I also cannot exclude the possibility that the declarations may be of some relevance or practical consequence to such decisions.

[93] Accordingly there is some broader utility of declarations being made which serve the purpose both of vindication, but perhaps more importantly in this case, providing guidance for future conduct. I will make declarations as to the unlawfulness of the temporary release and RTW circulars.

[94] I accept the Department's submission, however, that the declarations must be appropriately constrained to relate to the circulars themselves and not to any of the individual decisions as to entitlement to temporary release made pursuant to, or during the period they were in force.

Mr Smith's application - result

[95] Accordingly, I declare that:

(a) the temporary release circulars were an unlawful dictation and fetter on discretion in the manner described at [64] above; and

(b) the RTW circulars were an unlawful dictation and fetter on discretion in the manner described at [74] above.

[96] Mr Smith's application for judicial review is otherwise dismissed.

[97] I turn now to Mr Taylor's claim.

Mr Taylor's claim

[98] I first set out in more detail the factual background to and steps taken in the lead up to Mr Lightbown's decision of 11 December 2014. I then summarise the parties' submissions and then set out my analysis and conclusions on each of the issues arising.

Mr Lightbown's decision – more detail

[99] Mr Lightbown explains that immediately following Mr Smith's escape, and between around 9 and 18 November 2014, he put in place a process at Spring Hill for the review and risk assessment of all prisoners then on RTW. He explains this was commenced independently of the temporary release and RTW circulars, but was consistent with them.

[100] Mr Lightbown states that he wanted to assess all prisoners on RTW individually, paying particular attention to those subject to indeterminate sentences:

> …both because their offending/sentences show they are dangerous (and thus more likely to pose a high-risk of violent or sexual reoffending, as their risk is likely to stay static and require significant treatment to lower that risk) and because they were less likely to be close to release and reintegration into the community.

[101] Mr Lightbown explains how he refers to this group of prisoners as what he considers to be "high risk", not to be confused with prisoners generally with a formal "HRX" status within the prison system (though he notes that many prisoners serving indeterminate sentences will also have "HRX" status). Mr Lightbown says that he did not consider there to be any prohibition on him authorising RTW to prisoners with a formal "HRX" status.

[102] As part of the review and risk assessment process, Mr Lightbown asked his team to ensure that, in relation to each prisoner on RTW:

(a) Psychology reports were produced;

(b) Intel reports were available; and

(c) SDAC21 assessments were carried out.[76]

[103] He also directed that GPS training be carried out for all staff.[77]

[104] By 19/20 November 2014, Mr Lightbown had considered and discussed with his team each of the RTW prisoners he considered "high risk". This included Mr Taylor, serving an indeterminate sentence for kidnapping, rape and murder. At that stage, and having considered Mr Taylor's stable employment, the good feedback from his employer and that Mr Taylor "had come a long way on his personal journey", Mr Lightbown formed the view that Mr Taylor should remain on RTW. Mr Lightbown says he was also aware that Mr Taylor had a Parole Board hearing in December 2014 and did not want to jeopardise his prospects of parole by pulling him from RTW at that time. Mr Lightbown discussed his decision with the Regional Commissioner, who was satisfied with it, but suggested additional checks and conditions be included in Mr Taylor's RTW programme.

[105] Mr Lightbown explains that a little later in November 2014, and having received the 21 November 2014 RTW circular, he had queries as to the process for approving RTW decisions. He states that his understanding of the circulars was that the decisions were to be made by him, but he would need to advise and take advice from Regional Commissioners. He nonetheless wanted to be sure of that process.

[106] Mr Lightbown also explains that around 27 November 2014, and having considered the 21 November RTW circular (and "the category of prisoners identified as likely to pose a risk to the community"), he "stepped back" and "really thought what RTW was all about". He was concerned that to that point, the process had become somewhat mechanical, and that "many prisoners basically got RTW if they met the eligibility criteria and were well behaved". He states:

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[76] SDAC21 is a dynamic ongoing assessment of risk conducted by case managers.

[77] Given GPS monitoring could be a condition of RTW. Mr Lightbown also made arrangements for more GPS units to be purchased.

> The circular, and as far as I can recall, my discussions with the Regional Commissioner made me realise that a proper assessment of risk to the public was needed, particularly for dangerous prisoners serving indeterminate sentences (as highlighted in the circular) and I really needed to think about the way in which RTW would assist the prisoner's rehabilitation or reintegration into the community. While this seems obvious now, it had just not been the practice up to that point.

[107] On 28 November 2014, Mr Lightbown sought input on his decision-making in relation to Mr Taylor from the National Office High Risk Response Team. Given it was clear that the Team's feedback would not be forthcoming for some days, Mr Lightbown says he decided to temporarily suspend Mr Taylor's RTW. He says that:

> At this point in time I didn't feel I had enough evidence and expert opinion to fully assess his risk and suitability and hence continue his placement on RTW.

[108] By the end of November/early December 2014, an Advisory Panel had been set up at Spring Hill to consider and make recommendations about RTW. The first such Panel meeting was to take place on 4 December 2014.

[109] Mr Lightbown received the High Risk Response Team's views on Mr Taylor's continuation on RTW, on 1 December 2014. The Team's feedback was in summary that:

(a) Taking into the seriousness of Mr Taylor's offending, Departmental records and previous psychological report, Mr Taylor was assessed at moderate risk of reoffending;

(b) File information confirmed Mr Taylor's attendance at, and completion of, a variety of rehabilitative programmes;

(c) Even though the most recent psychological report of October 2014 supported ongoing RTW, it also expressed concerns that there had been no treatment regarding Mr Taylor's sexual deviancy and (by reference to Parole Board views in 2013) his ongoing denial of sexual deviancy remained a concern;

(d) Mr Taylor had not been subject to any misconduct and had good engagement and feedback from his employer; and

(e) In light of the above, ongoing RTW was supported with certain recommendations and considerations. In particular, the High Risk Response Team recommended further engagement with a Departmental psychologist to develop a robust safety plan, the review of the SDAC21 assessment, and the development of a robust RTW plan which included GPS monitoring.

[110] Mr Lightbown reviewed the feedback that day and asked that Mr Taylor be added to the Panel discussion scheduled for 4 December 2014.

[111] The Panel meeting went ahead on 4 December 2014. Present were the Spring Hill custodial systems manager, the operational support manager, the probation service manager, the principal case manager, an intelligence officer, a regional psychologist who covered Spring Hill, two RTW brokers, the activity manager, an admin support officer, the "manager industries" and Mr Lightbown. As the Panel was to make recommendations to Mr Lightbown as decision-maker, he did not consider it appropriate that he chair the meeting himself. The chair was a Ms Faull (the operational support manager), who Mr Lightbown describes as having "significant experience with probation and management of offenders in the community".

[112] Mr Lightbown says that by this time, he was:

> …really wanting to focus on individual risk assessments for RTW in relation to those categories of offenders that had been highlighted in the circular as likely posing a risk to the public. There was no blanket approach.

[113] In the event, a final decision was not taken on Mr Taylor's RTW status at the 4 December 2014 meeting. Mr Lightbown says:

> I was thinking that indeterminate sentenced prisoners were dangerous and had been identified in the circulars as high risk in terms of working in the community and potentially should not go out on RTW. Also it seemed that some sort of role would be played by the Regional or National Commissioner if they were to go out on to RTW. I felt that I needed more clarity on how to deal with indeterminate sentenced prisoners and I wasn't comfortable taking further steps on that day.

[114] Mr Lightbown also noted that he had information about Mr Taylor's individual risk by that date, and he knew Mr Taylor had a Parole Board hearing on 10 December 2014. He considered this could be relevant, either in terms of Mr Taylor being granted parole or the Parole Board identifying risks of him being in the community.

[115] Mr Taylor's Parole Board hearing was held on 10 December 2014. Mr Taylor was declined parole. The Board gave a short outline of the reasons why parole was declined, with its more detailed written reasons to follow. Mr Lightbown did not attend the hearing, but Mr Taylor's Principal Corrections Officer, Ms Ahyu, did. She entered a note in the centralised prisoner management system (IOMS) later that day, which stated:

> Prisoner attended NZPB today. Declined Parole. Reintegration to cease until issue of sexual devant [sic] has been dealt with. Awit [sic] confirmation from Board.

[116] The Spring Hill Advisory Panel met again on 11 December 2014. Most of those who attended on 4 December were present, including the two RTW brokers and the regional psychologist.[78] Mr Lightbown refers to the minutes of the meeting, including that what he was trying to convey was that "if I thought there was a good reason for an indeterminate sentenced prisoner to go on RTW, then there was scope for me to approve him but I would keep the Regional and National Commissioners in the loop (as they may have ideas as to mitigation and supervision)". Mr Lightbown goes on to say that:

> However, despite the fact I still wasn't entirely sure whether prisoners falling into the significant risk/indeterminate sentence category could actually go out on RTW, I did go ahead and consider each prisoner falling within that category (and other prisoners who appeared suitable to engage in RTW activities). Again, I did not take a blanket approach to considering these prisoners.

[117] Mr Lightbown explains how the Panel went on to discuss each prisoner, with each panel member providing input from their particular area of expertise or responsibility. In relation to Mr Taylor, Mr Lightbown states that (understandably) it is now difficult to recall exactly what was said, but that:

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[78] Ms Ahyu, who had attended Mr Taylor's Parole Board hearing, did not attend.

(a) The RTW brokers would have communicated the good feedback from Mr Taylor's employer and that GPS was available at his place of work;

(b) Details of Mr Taylor's offending and sentencing would have been provided;

(c) An update on the outcome of the Parole Board hearing would have been provided, and that he recalled the Parole Board did not support reintegration and had concerns about Mr Taylor's sexual deviancy, but the full reasons were not then available (rather than the summary in IOMS referred to at [115] above);

(d) Information was presented from the regional psychologist. Mr Lightbown says he cannot recall exactly what the psychologist said, but it was highly unlikely she would have departed from what was said in the most recent psychological report from October 2014 prepared for the Parole Board, namely that:

(i) Mr Taylor was estimated to be at moderate risk of general and violent re-offending and at a medium to low risk of sexual offending within the five years following his release from prison;

(ii) His safety plan could be made more robust with the inclusion of sexually-related risk management strategies; and

(iii) Further interventions focussing on sexual violence should occur.

[118] Mr Lightbown also refers to the High Risk Response Team's feedback which he had reviewed in early December (see [109] above), and says this "would have been in the back of my mind, but [I] do not think we discussed these views at the panel meeting".

[119] Mr Lightbown decided to decline Mr Taylor from continuing with RTW at that stage. He explains his decision as follows:

> I considered all of the above information and did not take my decision about Mr Taylor lightly. I knew he had a good work history and ethic. But the very serious nature of his offending ("the big three") and sentence and the advice that he should have further treatment for sexual violence meant he posed a risk to the community. Further, as parole had just been declined, there was no immediate need for Mr Taylor to be reintegrated into the community. I did place significant weight on the Parole Board's view that reintegrative activities should cease in these circumstances. That also brought home to me that the Parole Board was assessing risk in a more sophisticated way than we (at Spring Hill) had previously been doing. I decided not to approve Mr Taylor for RTW.

Submissions for Mr Taylor - summary

[120] Ms Levy, on behalf of Mr Taylor, acknowledges that Mr Lightbown's affidavit suggests the December 2014 decision about Mr Taylor's continuation on RTW was in fact made on an individual basis, unfettered by any direction that Mr Taylor was ineligible for consideration.

[121] As noted, Mr Taylor nevertheless submits there were a number of flaws or errors in the process by which Mr Lightbown reached his 11 December 2014 decision, namely:

(a) He was misled by the RTW circular issued on 21 November 2014, to the effect that Mr Taylor was necessarily high risk in the context of RTW because of his offending history, which was an inappropriate fetter on his discretion;

(b) He wrongly considered the risk to the safety of the community generally or in the context of parole (i.e. rather than in the context of RTW itself);

(c) He took into account the views of the Parole Board, and wrongly concluded the Parole Board's view was that Mr Taylor's risk profile was high enough that RTW should cease (when the Parole Board's

understanding was that Mr Taylor's was not in fact on RTW when Mr Smith escaped, which was itself also wrong);

(d) He failed to give any or adequate consideration to the views of the High Risk Response Team, which supported Mr Taylor's continuation on RTW (in that those views were "at the back of his mind", rather than "front and centre" with matters such as the Parole Board's views); and

(e) In relation to the mandatory relevant consideration of whether Mr Taylor posed an undue risk to the safety of others while outside the prison on RTW, Mr Lightbown needed considered, expert and adequate information,[79] which he did not have (other than the High Risk Review Team's views).

[122] In summary, Ms Levy submits the *only* information available to Mr Lightbown weighing against Mr Taylor returning to what had to that point been a successful placement on RTW was "a truncated report of the unorthodox views of a Parole Board," which was itself mistaken as to Mr Taylor's RTW status and considering risk in a different context in any event. Ms Levy says that the alleged "processing flaws" lead to the inescapable conclusion that Mr Lightbown's December 2014 decision was based on insufficient information directed to the RTW context, was unfair and thus deserving of a remedy.

Department's submissions in relation to Mr Taylor - summary

[123] Mr Fong delivered the Department's submissions on Mr Taylor's claim. He submits Mr Lightbown's decision was properly made having considered all relevant considerations. He says that Mr Taylor's application is a challenge to the merits of the decision.

[124] Mr Fong submits the evidence demonstrates Mr Lightbown did not make his risk assessment in a vacuum. Rather, he fully considered and was aware that he was making an assessment of risk in the context of RTW. Mr Lightbown's evidence is that

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79 *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264 (CA) at 303.

he placed significant weight on the Parole Board's view of Mr Taylor's prospects of reintegration and rehabilitation. Mr Fong says there was nothing improper in Mr Lightbown taking into account the Parole Board's views in this way, which could not be considered an irrelevant and therefore impermissible consideration.

[125] Mr Fong further submits that the High Risk Response Team's feedback was not itself a mandatory relevant consideration. But in any event, Mr Lightbown was aware of that feedback and *did* take it into account, and what weight he ascribed to it was properly a matter for him. Mr Fong submits the matters considered by the High Risk Response Team were the same matters considered by Mr Lightbown in any event.

[126] Finally, and to the extent Mr Taylor's case turns on whether Mr Lightbown had sufficient information before him on the question of whether Mr Taylor posed an undue risk to the community if released on RTW, Mr Fong submits the Court must consider such matters in a realistic way, and perfection is not expected or required. Ultimately, the test is one of reasonably adequate information, sufficient to allow a reasonably informed decision, judged in the circumstances prevailing at the time.[80] Mr Fong notes that "judicial review is, after all, not micro-management of decision-making processes".[81] In summary, Mr Fong says that based on the same factors considered by the High Risk Response Team, and taking into account feedback from a multi-disciplinary Advisory Panel and the Parole Board's most recent views, Mr Lightbown simply reached a different view to the High Risk Response Team, which he was entitled to do on the merits.

[127] I turn now to the issues arising on this aspect of Mr Taylor' claim.[82]

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80 *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP 201/93, 10 October 1995.

81 Citing Clifford J in *Wellington International Airport Ltd v Commerce Commission* HC Wellington, CIV-2011-485-1031, 22 December 2011 at [54].

82 For completeness, I note Mr Lightbown's comment that as Mr Taylor's parole had just been declined, there was no immediate need for Mr Taylor to be reintegrated into the community. In this context, the Department refers to observations of the Court of Appeal in *Miller v New Zealand Parole Board* [2010] NZCA 600 at [158] that "given the effects of re-integrative programmes degrade over time, they are sensibly deferred until such reintegration is reasonably imminent". Ms Levy was critical of these observations and submitted I am not bound by them, being obiter only. Mr Taylor's application is not based, however, on any suggestion that this aspect of Mr Lightbown's reasoning was an irrelevant consideration vitiating the decision or, for example, was unreasonable in the *Wednesbury* sense. It is accordingly not necessary or appropriate for me to engage further on this particular issue.

Did Mr Lightbown decline Mr Taylor's RTW application on a blanket basis that he was a violent offender subject to an indeterminate sentence?

[128] As noted, this ground was not pressed firmly on Mr Taylor's behalf.

[129] Mr Lightbown's evidence is clear that he took a tailored and individual approach to Mr Taylor's application for RTW, and did not approach it on the basis the RTW circulars required a blanket "rejection" of his application given he was a violent offender subject to an indeterminate sentence. Ms Levy accepted that Mr Lightbown's evidence "could be credible".

[130] It is correct that other communications to Mr Taylor *after* his application for RTW had been declined seemed to proceed on the basis that his application had been rejected given he was part of a particular class of prisoner. None of those communications were authored by Mr Lightbown himself.

[131] There is no basis upon which I ought to reject Mr Lightbown's evidence of the overall approach he took to Mr Taylor's RTW application. The contemporaneous documentary record leading up to the Advisory Panel meeting on 11 December 2014 demonstrates that an individualised approach was taken. Indeed, consideration of Mr Taylor's specific position would have been unnecessary if Mr Lightbown *had* applied the RTW circular on a blanket basis to prisoners serving indeterminate sentences. I observe that in light of Mr Lightbown's evidence and the contemporaneous record leading up to the 11 December 2014 decision, the later correspondence with Mr Taylor and/or his advisors was unhelpful in the impression it conveyed to him.

[132] I have also considered whether Mr Lightbown was "misled" or otherwise led into vitiating error by the RTW circulars. As I have already noted, the circulars' terms were not clear, and appear (not unreasonably) to have led to some confusion on Mr Lightbown's own part as to whether they were a directive that prisoners on indeterminate sentences could not be approved for RTW. Despite that confusion, however, and given he did not have clarification of the position by 11 December 2014, Mr Lightbown proceeded to make a decision on Mr Taylor on the premise it *was* open to him to approve him for RTW. Mr Lightbown therefore proceeded on the basis of

taking a "hard look" at prisoners on indeterminate sentences, which had been the focus of his review from the outset, i.e. prior to receipt of the 21 November 2014 circular.[83] Accordingly, while the text of the circular was not helpful and injected some confusion into what Mr Lightbown understood to be own decision-making role, he nevertheless proceeded to an individualised decision.

[133] On the basis Mr Lightbown approached his decision as taking a "hard look" at prisoners serving indeterminate sentences, I do not consider that approach was in and of itself unlawful.[84] In argument, Ms Levy accepted that guidelines can direct such a "hard look", provided it is based on relevant and not irrelevant considerations. In this case, taking a "hard look" was based on consideration of risk, being a relevant consideration set out in s 62(3) of the Act, coupled with the paramount principle of maintenance of public safety in s 6(1)(a).

[134] The first ground of challenge to Mr Lightbown's decision is therefore dismissed.

Did Mr Lightbown fail to consider whether Mr Taylor posed an undue risk to the community if released on RTW, and instead consider the safety risk more generally and/or in the context of parole?

[135] I am also satisfied this ground of challenge fails.

[136] There is no doubt Mr Lightbown was aware that he was considering Mr Taylor's application for RTW in the context of release onto RTW itself, and the safeguards and monitoring available through such a process. This is evident from, for example, his initial decision to continue Mr Taylor on RTW; his knowledge of Mr Taylor having been on GPS monitoring while he had been on RTW; his ordering of further GPS units in the context of his overall review; his discussions with the Regional Commissioner on 19 or 20 November 2014 who suggested additional monitoring and checking that could be undertaken for Mr Taylor to remain on RTW; considering the feedback from the RTW brokers on Mr Taylor's employer's views and

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83 See the discussion at [99]-[104] above of Mr Lightbown initiating a review immediately after Mr Smith's escape.

84 *Re Findlay* [1985] AC 318 (HL).

his good history on RTW; and the continued availability of GPS at Mr Taylor's workplace.

[137] It is correct Mr Lightbown placed significant weight on the Parole Board's views, at least as they were available to him on 11 December 2014. I address further below whether this in and of itself was in error. Ms Levy submits there is nothing in the material available to Mr Lightbown to support a view that the Parole Board was assessing risk *in relation to RTW* in a more sophisticated way than had been happening at Spring Hill previously. However, it is not credible, in my view, to suggest Mr Lightbown did not carry out his risk assessment of Mr Taylor in the context of the risk Mr Taylor posed if released *on RTW* and with an understanding that the Parole Board was considering Mr Taylor's risk assessment in the context of parole (and not release on RTW).

Did Mr Lightbown err in taking into account the views of the Parole Board (which are said themselves to be based on a mistake of fact)?

[138] Mr Taylor's amended pleadings state that:

> Mr Lightbown made a mistake of fact in relying on erroneous descriptions of the New Zealand Parole Board's view, which erroneously indicated that Mr Taylor's reintegrative activities should cease.

[139] As noted above, the information available to Mr Lightbown at the time of his 11 December 2014 decision was the summary of the outcome of the Parole Board hearing on 10 December 2014 contained in the IOMS system. The Parole Board's full reasoning was not then available, and Ms Ayhu, who had attended the Parole Board hearing, was not present at the 11 December 2014 Advisory Panel meeting.

[140] Ms Levey submits it is clear from the full Parole Board decision that the Board was under the erroneous impression that Mr Taylor had been stood down from RTW *prior* to Mr Smith's escape, as a result of incurring a speeding fine when travelling to his workplace and engaging in an argument with a Corrections officer. Ms Levy submits the important point to be drawn from this is that the Parole Board did not, as reported in the IOMS system, direct that Mr Taylor's reintegrative activities should *cease*; rather, given they (wrongly) thought he had already ceased RTW, its view was

that there should not be any *reinstatement* of reintegrative activities pending several issues being addressed, including what it viewed as Mr Taylor's failure to acknowledge the elements of sexual deviancy in his offending.

[141] Ms Levy submits (by reference to earlier and later Parole Board decisions concerning Mr Taylor) that "this would appear to be an unusually bold, harsh, and blanket approach to reintegrative activities by this particular Parole Board". However, the Parole Board's decision or approach on 10 December 2014 is not under challenge in these proceedings. Mr Taylor's submissions accept that "clearly there are different views on whether reintegrative activity can or [should] take place alongside the addressing of risks such as an unacknowledged sexual deviancy." The submissions on this aspect of Mr Taylor's application in particular demonstrate that a not insignificant aspect of Mr Taylor's challenge to Mr Lightbown's decision concerns the merits of that decision.

[142] But putting those observations aside, I do not consider the fact Mr Lightbown took into account and placed weight on the Parole Board's views, as recorded in IOMS, was in error, resulting in his decision being unlawful. There is no suggestion the Parole Board's views were *irrelevant*; indeed, Ms Levy accepted they were a matter Mr Lightbown was entitled to take into account. That must be right. So long as the decision-maker is conscious of the different context in which risk is being considered (i.e. parole versus RTW), an expert body's assessment of a prisoner's risk in the community could not be said to be an irrelevant consideration. And as noted above, I am satisfied Mr Lightbown was aware of the context in which he was carrying out his decision-making compared to that of the Parole Board. Further, unless the weighing of various factors is so perverse as to be manifestly unreasonable, the weight a decision-maker puts on relevant considerations is a matter for them not the Court.[85]

[143] To the extent the IOMS entry incorrectly recorded that the Parole Board's view was the reintegration activities cease rather than be reinstated, I do not consider this advances Mr Taylor's argument. Mr Lightbown himself was plainly aware of the

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[85] Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [69.1.1]; Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis NZ, Wellington, 2018) at [15.56].

status of Mr Taylor's reintegration activities as at 11 December 2014, given it was he who had directed on 28 November 2014 that Mr Taylor should cease RTW pending the review being completed. It is not clear to me, nor was it explained, how a view that reintegration cease, rather than be reinstated, in light of the Parole Board's overall risk assessment of Mr Taylor, would have altered matters. Mr Lightbown was influenced by and placed weight on the Parole Board's view that Mr Taylor's needed to address his sexual deviancy before it supported reintegration. That was the substance of the Parole Board's views taken into account by Mr Lightbown, rather than a narrow distinction between reintegration ceasing or being reinstated.

[144] I accordingly do not consider Mr Lightbown fell into error in taking into account and placing weight on the Parole Board's views, as understood by him at 11 December 2014.

Did Mr Lightbown err in failing to consider the view of the High Risk Response Team or make his decision on the basis of insufficient information concerning risk?

[145] I have considered the last two issues set out at [121] above together, as they give rise to similar considerations.

[146] In short, Ms Levy accepts on behalf of Mr Taylor that the High Risk Response Team's views were not themselves a mandatory relevant consideration. But she submits that:

> Mr Lightbown was looking at the mandatory considerations in s 62(3) of the [Act]. His particular concern was risk. It was a serious failure to not pay close attention to the views of the High Risk Response Team, which supported Mr Taylor returning to RTW. Mr Lightbown had sought the views of that team because he wanted the views of the National office experts on Mr Taylor's suitability for RTW. Mr Lightbown was not bound by the views of the High Risk Response Team, but given its particular consideration of Mr Taylor's risk for RTW, he was obliged to consider its report and reasoning.

[147] I am satisfied this aspect of Mr Taylor's challenge must also fail.

[148] Having sought the High Risk Response Team's feedback, Mr Lightbown did take it into account; he received and reviewed the feedback on 1 December 2014, which led him to request that Mr Taylor be placed on the agenda for discussion at the Advisory Panel meeting on 4 December 2014. He also noted that when discussing

Mr Taylor's application at the Panel meeting on 11 December 2014, having reviewed the Team's feedback earlier in the month, its views would have been "at the back of his mind". That feedback was not specifically discussed at the Panel meeting, but nor was there any requirement that it was. It was known to and had been considered by Mr Lightbown as decision-maker.

[149] Through the hearing, the focus of this aspect of Mr Taylor's challenge boiled down to the submission that the High Risk Review Team's response should have been "front and centre" of Mr Lightbown's consideration on 11 December 2014, being the only "considered, expert and adequate" information available at that time on whether Mr Taylor would pose an undue risk to the community if released on RTW.

[150] I do not accept that submission. Mr Lightbown took a number of steps in the lead up to 11 December 2014 to ensure he was in possession of sufficient information to make a decision on Mr Taylor's RTW; indeed he had deferred earlier decision-making given he was not comfortable he had such information. As set out in the earlier discussion of the background to Mr Lightbown's decision-making:

(a) He had called for a range of assessments and information in relation to each prisoner on RTW during the period 9 November 2014 to 18 November 2014;

(b) He had requested and reviewed feedback from the High Risk Response Team;

(c) He assembled a multi-disciplinary Advisory Panel to discuss and advise on RTW on a prisoner-by-prisoner basis;

(d) He took into account the Parole Board's views on risk in relation to Mr Taylor;

(e) He took into account the regional psychologist's views on risk in relation to Mr Taylor; and

(f) He had reports from the RTW brokers as to Mr Taylor's good history and feedback when in employment, and was also conscious of the conditions and monitoring available while Mr Taylor was on RTW.

[151] I also accept the submission on behalf of the Department that the key matters underpinning the High Risk Response Team's views were available to and considered by Mr Lightbown in any event. The High Risk Response Team's views were based on Mr Taylor's risk profile of reoffending; the October 2014 psychological report; his ongoing denial of sexual deviancy (by reference to Parole Board views in 2013); [86] his good engagement with his employer; and his attendance and engagement with various rehabilitative programmes and treatment. The same (or in the case of the Parole Board's views, more recent) information was before Mr Lightbown, either directly or via the psychologist report of October 2014.

[152] Accordingly, while Mr Lightbown's December 2014 decision was no doubt very disappointing to Mr Taylor, and while others may have taken a different view, I do not consider he made his decision on the basis of insufficient information. Nor do I consider it was otherwise unlawful. Ultimately, the fact others might have reached a different conclusion is not a proper basis to set aside statutory decision-making.

[153] For the above reasons, Mr Taylor's application to judicially review Mr Lightbown's decision of 11 December 2014 is dismissed.

Result and costs

[154] I have made declarations on Mr Smith's application as set out at [95] above.

[155] Mr Taylor's application for judicial review of the RTW decision made about him on 11 December 2014 is dismissed.

[156] Mr Smith is self-represented and has presumably not incurred any legal costs. He is, however, entitled to be reimbursed his reasonable out of pocket disbursements in connection with this proceeding, including any filing fees. If the parties cannot

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[86] The High Risk Response Team's feedback was provided prior to Mr Taylor's Parole Board hearing on 10 December 2014.

agree on these matters, Mr Smith may file a costs memorandum within **15 working days** of the date of this judgment. The Department may file a response with a further **10 working days**. No memorandum is to exceed **five pages** in length.

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Fitzgerald J

SCHEDULE 1

Circular: Correction Services Circular 2014/02

Subject: Temporary release procedures

Authority: These instructions constitute the Chief Executive Guidelines for the management of prisoner's temporarily released under sections 62 and 63 in accordance with section 196(1)(a) of the Corrections Act 2004.

These instructions are in addition to the instructions contained in the Prison Operations Manual M.04.06 Temporary release section and apply over any contradicting instructions contained in that section.

Duration: These instructions will remain in force until the Prison Operations Manual has been reviewed or the Chief Executive revokes them.

Purpose

These procedures are to provide interim guidance to Corrections staff when temporary release is being considered for a prisoner whose circumstances are exceptional.

Background

On 11 November 2014 the Chief Executive, in consultation with the National and Regional Commissioners, directed all temporary release of prisoners will cease pending a comprehensive review of the temporary release processes and policies.

The only exceptions will be approval for prisoners involved in Release to Work and those related to supervised programmes, or when exceptional circumstances apply. For prisoners who have special circumstances, e.g. a family bereavement or tangi, escorted temporary removal is still available as an option.

Exceptional Circumstances Eligibility Criteria

Prisoners may only be considered for temporary release in exceptional circumstances if they have a minimum security classification and are serving a sentence of:

- 24 months or less, or
- More than 24 months and the NZ Parole Board has specified a release date.

For prisoners who do not meet the exceptional circumstance criteria the prison manager must consider the option of the prisoner being escorted (temporarily removal).

Authority to approve temporary release in Exceptional Circumstances

The delegation for temporary release for prisoners where exceptional circumstances apply has been lifted to Regional Commissioners. All prisoners with exceptional circumstances that may require temporary release e.g. compassionate grounds, must be approved by your Regional Commissioner.

Temporary releases for prisoners where there are exceptional circumstances will be limited to a maximum 12 hour period. If the Regional Commissioner supports a longer period they must obtain the support from the National Commissioner.

Prison Managers must review and confirm the suitability of applications for temporary release before they are referred to the Regional Commissioner for consideration.

GPS Monitoring Condition

Prior to an application for temporary release for prisoners where exceptional circumstances exist is referred to the Reginal Commissioner, it will be necessary for the Prison Manager to first consider if the prisoner should be subject to a condition of GPS monitoring (refer Use of GPS technology with Prisoners on Temporary Release for further information relating to GPS).

Prison Managers must advise their Regional Commissioner of their reasons for supporting or not, the prisoner to be subject to GPS monitoring. The Regional Commissioner may direct that a prisoner be subject to GPS monitoring during the temporary release if they consider it necessary.

The following prisoners should be subject to a condition of GPS monitoring during their temporary release, unless the Reginal Commissioner is satisfied it is not necessary or is not practicable, in which case they should decline the temporary release:

- Child sex offenders subject to an indeterminate sentence.
- Offenders subject to a finite sentence who are likely to be suitable for an Extended Supervision Order or where the Department has applied for such an order.
- Other sexual offenders subject to an indeterminate sentence.
- Violent Offenders subject to an indeterminate sentence.

Review prisoners released to supervise programmes or release to work

All Prison Managers should review the conditions of prisoners involved in Release to Work, those released to supervised programmes and assess whether the prisoner should be subject to GPS monitoring during their temporary release, if they are not already.

Additional considerations for conditions of release

In addition to that (mandatory) conditions contained in the M.04.06 Form.05 for temporary release from custody (IOMS form) and M.04.06.Res.04 Temporary release conditions the Prison Manager must consider before approving temporary release in exceptional circumstances:

- Requiring the offender (or a relative) to surrender any valid NZ or foreign passports to the prison (or another authority)

- If we cannot rule out their possession of a valid NZ or foreign passport, preparing a contingent border alert request for that offender. This should be sent to Tony Coyle and the Incident Line before approving temporary release, using a template that will be distributed in the next day or two. (The request would not be issued to Interpol unless the Incident Line is informed that the sponsor is not in the control of the offender, or there is some other cause for concern.)

Prison Manager may also consider recommending a condition that the prisoner physically report to (the nearest) Police Station during the temporary release. This must only apply with the NZ Police consent.

The Prison Manager may also recommend any of the conditions contained in M.04.07.Res.01 Conditions application matrix.

If the prisoner is required to travel by air, this must be under escort and to the nearest prison to the approved destination. Under no circumstances is a temporarily released prisoner to be approved to take a flight unescorted.

Approval of sponsor

The Prison Manager must ensure the temporary release nominated sponsor is a fit and proper person to supervise the prisoner during their temporary release. In addition to the considerations contained in M.04.06.Form.04 Department of Corrections sponsor verification form the Prison Manager must:

- confirm the nominated sponsor is an "Approved" visitor (i.e. their criminal record has been checked).
- check that as an approved visitor the nominated sponsor has not been involved in an incident(s) involving the prisoner.
- check with Corrections Intelligence if they have information of the nominated sponsor.

If there are any concerns that the nominated sponsor is not a fit and proper person to supervise the prisoner during their temporary release the Prison Manger must advise the Regional Commissioner.

Confirmation of sponsor's responsibilities

In addition to the sponsor acknowledging (in writing) that they understand the conditions of the prisoner's temporary release they must agree to:

- oversee the prisoner's behaviour and compliance with his or her temporary release conditions, including their return to prison at the stipulated time;
- inform prison staff immediately, or as soon as possible, if a prisoner breaches his or her temporary release conditions; does not remain in the sponsors control, or there are any behavioural or safety issues.

The Prison Manager may require the sponsor to provide updates on whether the prisoner is compliant with the conditions of the temporary release by

- "checking in" by ringing the Prison at specified times (times (e.g. on delivery of the offender to an agreed location, at regular intervals thereafter and before returning the offender to prison at the agreed time), and, or
- agreeing to respond to random call(s) from the prison during the period of temporary release.
- requiring the offender to orally acknowledge their presence at these times.

Breach and cancellation of temporary release

The prisoner will be considered in breach of the conditions of their temporary release licence and will be considered unlawfully at large:

- if they have failed to return at the specified time, or
- the sponsor advises the prisoner has breached any of their temporary release conditions, or
- the sponsor has failed to check-in at the stipulated time (and only after prison staff have made a reasonable attempt to contact the sponsor via an agreed telephone number), or
- the prisoner has failed to attend a Police Station at a time specified.

In the event a prisoner is in breach and unlawfully at large the Prison Manager must:

- Immediately notify the Incident Line 0800 555 500, and complete IOMS incident report for a "Breach of Temporary Release Conditions"
- Immediately notify the Police of the prisoner's identification details and most recent photograph and direct they arrest and return the prisoner to prison.
- Liaise with the Police to manage the most appropriate and timely notification to victims (VNR Policy) and to ensure their needs are responded to.

Please ensure all staff are aware of their responsibilities and the standards that must be met when a prisoner is being considered or approved for temporary release.

SCHEDULE 2

2014/03 Release to work

To: All Regional Commissioners and Prison Managers

Issued: 21 November 2014

Type: Instructions

Circular: Corrrection Services Circular 2014 / 03

Subject: Release to Work procedures

Authority: These instructions constitute the Chief Executive Guidelines issued in accordance with section 196(1)(a) of the Corrections Act 2004 for the management of prisoners temporarily released for the purpose of employment under sections 62 and 63 of the Corrections Act 2004.

These instructions are in addition to the instructions contained in the Prison Operations Manual M.04.07 Release to work section and override any contradicting instructions contained in that section.

Duration: These instructions will remain in force until the Prison Operations Manual has been reviewed or the Chief Executive revokes them.

Purpose

These instructions specify the interim procedures to be followed by Corrections staff responsible for managing prisoners currently approved, or who are being considered, for temporary release for the purpose of employment (Release to Work).

Background

Prisoners approved for Release to Work are not included in the Chief Executive direction issued on 11 November 2014 that all temporary release of prisoners will cease, unless there are exceptional circumstances, pending a comprehensive review of the temporary release processes and policies.

Pending this instruction, the National Commissioner directed that all Prison Managers should review the conditions of prisoners involved in Release to Work and assess whether the prisoner should be subject to GPS monitoring during their temporary release, if not already specified.

The location of a prisoner's employment may not be suited to the application of a condition of GPS monitoring during the prisoner's release. In these instances Prison Managers have imposed other additional monitoring requirements (random telephones calls from the prison and increased site visits from Corrections Staff) and the frequency they occur.

To ensure there is consistency with the management of prisoners outside the secure perimeter, the following interim instructions, that align with the Temporary Release interim procedures (National Circular 2014 02A), will apply to all prisoners currently approved, or who are being considered, for Release to Work.

Release to Work Eligibility Criteria

Prisoners may only be considered for Release to work if they meet the eligibility criteria set out in M.04.07.01 Eligibility criteria. If there are any concerns that the prisoner still poses a risk to the community the application for Release to Work must not be approved, in particular where the Court has indicated a significant risk, including:

- Child sex offenders subject to an indeterminate sentence.
- Offenders subject to a finite sentence who are likely to be suitable for an Extended. Supervision Order or where the Department has applied for such an order.
- Other sexual offenders subject to an indeterminate sentence.
- Violent offenders subject to an indeterminate sentence.
- Violent/ sexual offenders sentenced to a term of more than two years who have not addressed their offending by completing a rehabilitative programme.

GPS Monitoring Condition

Prior to approving the prisoner for Release to Work the Prison Manager should assess whether the prisoner should be subject to GPS monitoring release (refer Use of GPS technology with Prisoners on Temporary Release for further information relating to 13PS) during their release.

If the Prison Manager does not consider it necessary for a condition of GPS monitoring to apply during the prisoner's release they must record their reasons on the M.04.07.Form.01 RTW application and assessment.

Additional conditions of release

Before recommending Release to Work the Prison Manager must require the offender to surrender any current NZ passport or foreign passports and other travel documents to the prison (or another specified authority).

The prisoner's IOMS photograph must be updated prior to their approval for Release to Work and during the period they are approved for Release to Work their photograph must be refreshed every three months.

In addition to the (mandatory) conditions contained in M.04.07.Form.04 Authority for release to work (IOMS form) and M.04.07.Res.01 Conditions application matrix the additional conditions must apply to any prisoner approved for Release to Work:

- They must not apply for a passport or any other travel documents.
- They must stay in New Zealand, and
- They must not go within 500 metres of an airport boundary.

Under no circumstances will a prisoner on Release to Work be approved to travel by air.

Suitability of employer

The Prison Manager must ensure the employer is a fit and proper person to supervise the prisoner during their Release to Work. In addition to requiring the employer to complete M.04.07.Form.02 Employer security checklist form, the Prison Manager must check:

- if the employer is an approved visitor and has not been involved in any incident(s).
- with Corrections Intelligence for information about the employer

Confirmation of employer's responsibilities

The employer must certify in writing (refer M.04.07.Form.05 Agreed employer responsibilities) that they:

- understand the conditions of the prisoner's temporary release
- agree to all standard employer responsibilities including the specified type of monitoring set out in M.04.07.10 Supervision and random checks and the frequency
- provide a full itinerary including location and times of activities planned during the period the Release to Work before the prisoner is released
- **Note**: the type and frequency of the monitoring will be influenced by the location of the prisoner and the planned activities contained in the itinerary.
- advise the prison of any changes to the itinerary before they occur

Prison Managers must ensure the employer is provided with a copy of the M.04.07.Form.04 Authority for release to work. M.04.07.Form.05 Agreed employer responsibilities and current itinerary each time it is refreshed.

Breach of temporary release conditions

In addition to M.04.07.11 Breach of RTW Conditions and M.04.07.12 Escape while on release to work the prisoner will be unlawfully at large if:

- the prisoner has failed to return at the specified time, or
- the employer advises that the prisoner has breached any of their temporary release conditions, or
- the employer or prisoner has failed to check-in at the specified time (and only after prison staff have made a reasonable attempt to contact the employer via an agreed telephone number), or
- staff have directed the prisoner to immediately return to the prison due to concerns the prisoner has breached the conditions.

In the event a prisoner is in breach and unlawfully at large the Prison Manager must:

- Immediately notify the Incident Line 0800 555 500, and complete an IOMS incident report for a "Breach of Temporary Release Conditions".

- Immediately notify the Police of the prisoner's identification details and most recent photograph and direct them to arrest and return the prisoner to prison.
- Liaise with the Police to manage the most appropriate and timely notification to victims (VNR Policy) and to ensure their needs are responded to.

Please ensure all staff are aware of their responsibilities and the standards that must be met before a prisoner is approved for temporary release for the purpose of employment.